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Supreme Court of The United States

October Term, 1975

No. 75-1920

UNITED STATES OF AMERICA, *Petitioner,*

versus

J. C. LONG, ET AL., *Respondents,*

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF OF RESPONDENTS IN OPPOSITION

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INDEX

	Page
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Statutory Provisions Involved	2
Statement	4
Reasons for Denying the Petition	5
I. Appellant's policy arguments and statutory construction efforts are erroneous and unpersuasive grounds for issuance of a writ of certiorari	7
II. Section 813 does not provide for recovery of compensatory money damages	14
Conclusion	16

CITATIONS

Cases:	Page
Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975)	7, 14
Beacon Theatres, Inc.v. Westover, 359 U.S. 500 (1959)	11
Clemons v. Runck, P-H E.O.H. Rep. §13,734 (S.D. Ohio, No. C-1-74-166, decided Nov. 3, 1975)	8
Curtis v. Loether, 415 U.S. 189 (1974)	10, 11, 15
Dairy Queen, Inc. v.Wood, 369 U.S. 469 (1962)	11
Equal Employment Op. Comm'n v. Detroit Edison Co., 515 F.2d 301 (6th Cir. 1975)	10
Harper v. Reap Realty, No. C-75-70 (N.D. Ohio, decided Feb. 6, 1976)	8
Howard v. Lockheed-Georgia Co., 372 F. Supp. 854 (N.D. Ga. 1974)	15
Jarecki v. G. D. Searle & Co., 367 U.S. 303 (1961)	10
Loo v. Gerarge, 374 F. Supp. 1338 (Hawaii 1974)	15
Rogers v. Loether, 467 F. 2d 1110 (1972)	4
Ross v. Bernhard, 396 U.S. 531 (1970)	11
United States v. Baranski, 484 F. 2d 556 (7th Cir. 1973)	10
United States v. Berg Enterprises, Inc., No. WPB-75-139-Civ-CF (S.D. Fla., decided Dec. 10, 1975)	9
United States v. Chatham, No. 75-1222A (N.D. Ga., decided Dec. 24, 1975)	9
United States v. Fogelman Management Corp., P-H E.O.H. Rep. §18,008 (W.D. Tenn., No. C-76-45, filed Feb. 5, 1976)	9
United States v. Georgia Power Co., 474 F. 2d 906 (5th Cir. 1973)	15
United States v. Hilton-Sykes Rental Agency, Inc., P-H E.O.H. Rep. §13,727 (M.D. Fla., No. 74-322-Civ-T-H, decided Sept. 18, 1975)	9

CITATIONS Continued

Cases:	Page
United States v. Insco, 496 F. 2d 204 (5th Cir. 1974)	10
United States v. Long, P-H E.O.H. Rep. §13,733 (4th Cir., No. 74-1398, decided Oct. 28, 1975)	9
United States v. Mitchell, No. CA-3-7887-G (N.D. Tex., decided June 16, 1976)	9, 14, 15
United States v. Northside Realty Associates, Inc., No. 13932 (N.D. Ga., decided Feb. 11, 1976)	9
United States v. West Peachtree Tenth Corp., 437 2d 221 (5th Cir. 1971)	10
United States v. West Suburban Board of Realtors, P-H E.O.H. Rep. §13,641 (N.D. Ill., No. 69-C-1460, decided Feb. 6, 1974)	9
Van Hoomissen v. Xerox Corp., 368 F. Supp. 829 (N.D. Cal. 1973)	15

Constitutional Provisions:

U.S. Constitution Amendment VII	11

Statutes and Rules:

Equal Employment Opportunity Act of 1972 (amending Title VII of the Civil Rights Act of 1964), 86 Stat. 103, 42 U.S.C. 2000e	5, 14, 15
Fair Housing Act (Title VIII of the Civil Rights Act of 1968, 82 Stat. 81, 42 U.S.C. 3601, *et. seq.*:	
Section 804, 42 U.S.C. 3604	4
Section 810, 42 U.S.C. 3610	10, 12, 14
Section 812, 42 U.S.C. 3612	*passim*
Section 813, 42 U.S.C. 3613	*passim*
42 U.S.C. 1982	8, 13, 14
Federal Rules of Civil Procedure, Rule 38 (a)	11
Federal Rules of Civil Procedure, Rule 42 (b)	11

CITATIONS Continued

Cases: Page

Miscellaneous:

P-H E.O.H. Rep., Report Bulletin 17 (February 23, 1976) 9

P-H E.O.H. Rep., Report Bulletin 19 (March 22, 1976) 14

Right to a Jury Trial in Civil Actions, 72 Yale L.J. 655, 692-93 (1962-63) 11

Comment, The Seventh Amendment and Civil Rights Statutes, 68 Nw. U.L.Rev. 503 (1973) 11

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OPINIONS BELOW

Neither the opinion of the court of appeals (Appellant's brief, App. A, pp. la-12a) nor the opinion of the district court (Appellant's brief, App. D, pp. 16a-60a) is officially reported; however, both are partially reported unofficially.

JURISDICTION

The Respondents have no objection to the jurisdiction of this court.

QUESTION PRESENTED

Whether Section 813 of the Fair Housing Act permits the Attorney General to seek and recover monetary damages.

STATUTORY PROVISIONS INVOLVED

The Fair Housing Act (Title VIII of the Civil Rights Act of 1968), 82 Stat. 81 *et seq.*, provides in relevant part:

Section 812, 82 Stat. 88, 42 U.S.C. 3612, entitled "Enforcement by private persons:"

> (a) • • • The rights granted by section 3603, 3604, 3605 and 3606 of this title may be enforced by civil actions in appropriate United States district courts without regard to the amount in controversy and in appropriate State or local courts of general jurisdiction. • • •
>
> • • • • •
>
> (c) • • • The court may grant as relief, as it deems appropriate, any permanent or temporary injunction, temporary restraining order, or other order, and may award to the plaintiff actual damages and not more than $1,000 punitive damages, together with court costs and reasonable attorney fees, in the case of a prevailing plaintiff: *Provided*, That the said plaintiff in the opinion of the court is not financially able to assume said attorney's fees.

Section 813, Stat. 88, 42 U.S.C. 3613:

> Whenever the Attorney General has reasonable cause to believe that any person or group of persons is engaged in a pattern or practice of resistance to the full enjoyment of any of the rights granted by this subchapter, or that any group of persons has been denied any of the rights granted by this subchapter and such denial raises an issue of general public importance, he may bring a civil action in any appropriate United States district court by filing with it a complaint setting forth the facts and requesting such preventive relief, including an application for a permanent or temporary injunction, restraining order, or other order against the person or persons responsible for such pattern or practice or denial of rights, as he deems necessary to insure the full enjoyment of the rights granted by this subchapter.

STATEMENT OF THE CASE

On December 27, 1971, the Attorney General filed his Complaint herein pursuant to Section 813 of the Fair Housing Act seeking only injunctive relief. The case was placed (and remained) on the civil, non-jury calendar. Not until September 12, 1973 did the Attorney General indicate he would seek money damages.[1] Timely motions for a jury trial and a directed verdict as to the unavailability of money damages under Section 813 were denied by the trial court. The issue of liability (*i.e.*,whether Respondent had in fact violated Section 804) was tried by the court, and it ruled in Appellant's favor on January 14, 1974.

The district court held that compensatory damages were recoverable, apparently in unlimited amounts, without jury trials, by third persons, not parties to the action, on a complaint brought by the United States which prayed solely for injunctive relief under a statute which provides only for equitable relief.

The following questions of first impression gave the district court doubt, and were certified to the United States court of appeals for the fourth circuit:

> (1) Whether, in a suit brought by the Attorney General under Section 813 of the Act, affirmative relief in the form of monetary damages, may be awarded to the individual victims of discrimination; and,

[1] Answer to Respondent's Interrogatory No. 89: "Plaintiff states that appropriate relief in this case should include provisions for putting the victims of past discriminatory practices in their rightful place and making them whole by, among other things, compensating them for the damages they have suffered as a result of the Defendant's past discriminatory practices." Possibly, Rogers v. Loether, 467 F. 2d 1110 (C.A.7th 1972) spawned the government's belated intent to seek damages *without* a jury trial.

> (2) If so, whether Defendants are entitled to a jury trial on the issue of monetary relief.[2]

The court of appeals, on October 28, 1975, reversed the portion of the district court order which had provided for money damage recoveries by individuals in actions by the Attorney General under Section 813.[3] Because it was unnecessary to its decision, the Seventh Amendment jury trial issue was not addressed by the court of appeals.

REASONS FOR DENYING THE PETITION

INTRODUCTION

The exceedingly lengthy injunctive order[4] issued by the district court two and a half years ago has been strictly adhered to without the first whisper of dissatisfaction by the public, the Respondent, the district court, or the United States. Moreover, the racial composition of the apartments involved bears not the slightest resemblance to the picture

[2] The district court decided that "[t]hose who have been discriminated against should in proper cases be awarded reasonable monetary relief in keeping with the damages they have suffered as a result of any discriminatory practices imposed upon them." The premise by the district court, urged here by Appellant and rejected by the court of appeals, was that back-pay recoveries in Title VII actions by the United States are possible; therefore, damages, being likewise "monetary", ought be recoverable in Title VIII actions by the United States.

[3] Appellant's petition for re-hearing was denied by the court of appeals on February 5, 1976; it did, however, revise its initial opinion to provide, on remand, that the district court determine whether equitable restitution would be appropriate here (*e.g.*, return of any discriminatory deposits or over-charges). If so, that equitable relief was held to be available.

[4] The order imposed a wide-ranging injunction upon Respondents including adoption of non-racial sales and rental standards, posting of notices of all available housing, procedures regarding rental applications, instructions to and statements from agents and employees, Fair Housing display signs, Fair Housing logo on all advertising, notices to the Naval Housing Officer, and extensive and frequent reporting requirements to the Justice Department for two years.

of a few years ago.

This is one practical answer to Appellant's ungrounded claim that the court of appeals' decision reduces Section 813 effectiveness.[5]

By far the clearest and most fundamental response, however, is that there is not one word or phrase within Section 813 to indicate legislative intent to provide for money damages in actions brought by the United States. In order to fault the opinion of the court of appeals, one must accept the implausible notion that Congress changed signals between the time it drafted Section 812 and Section 813. Appellant beseeches this Court to accept the proposition that Congress, while expressly providing for damages, amount limits, and a statute of limitation in Section 812, meant for the same recovery to be available under Section 813 by *not* using any of those terms.[6]

We shall provide this Court with our reasoning as to why a writ of certiorari should not issue by dividing our argument into two sections. Initially, we will respond to Appellant's suggestions, and then conclude by exploring more fully the foundation for the court of appeals' decision.

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[5] In the five years of enforcement preceding the district court order herein, the government has made no showing that its efforts were ineffective even though there was no precedent for recovery of damages under Section 813.

[6] It should also be noted that Appellants wish Section 813 to be construed so as to selectively incorporate the provisions of Section 812. Thus, as the Appellants argued in the fourth circuit, Section 813 should be read to include Section 812's rights to recover monetary damages but should not be interpreted to include the statute of limitations expressly set forth in Section 812 nor the right to a trial by jury.

I.

APPELLANT'S POLICY ARGUMENTS AND STATUTORY CONSTRUCTION EFFORTS ARE ERRONEOUS AND UNPERSUASIVE GROUNDS FOR ISSUANCE OF A WRIT OF CERTIORARI

The three grounds offered in Appellant's petition for a writ may be easily distilled. The first deals with ostensible policy reasons as to why Section 813 damage recoveries are vital to effective public enforcement. The latter two concern Appellant's suggested statutory construction. Respondent's rebuttal will appear just after each of Appellant's three points. The first ground Appellant offers is as follows:

> 1. Section 813 actions involve situations where individual lawsuits are neither "desirable" nor "practicable". Moreover, the effectiveness of Section 813 actions depends largely on monetary damages [citing *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975)]. However, the court of appeals' decision (a) leaves real estate owners little incentive to obey the law so that (b) damages suffered will go uncompensated, and (c) Appellants efforts to enforce the law will be impeded. On this account, and due to a "conflict among the district courts" regarding Section 813 damage recoveries, a writ should issue.

Legislative debate provides the most appropriate forum for advocating the addition of language to a statute which was, we must assume, deliberately excluded from it. Certainly there can be no quarrel from Appellant that Congress could have as effortlessly provided for damages in Section 813 as it did in Section 812. Since it did not do so, we believe it extremely unlikely that Congress intended the construction requested by Appellant.

The danger accompanying questions of "practicability" is that it invites judicial interference with legislative decisions. Nevertheless, Appellant's premises regarding "practicability" are vulnerable. The monetary advantages [unlimited actual damages, punitive damages up to $1,000.00, attorneys fees, free court costs, no security requirements] and options [conciliation or suit for injunctive and monetary relief under Section 812; suit for injunction or damages under 42 U.S.C. §1982] afforded private litigants have induced countless, successful conciliation agreements and lawsuits for housing discrimination.[7]

Appellant is on even less firm ground in suggesting that monetary damages are the key to effective prosecution by the United States under Section 813. Prior to the district court decision herein, we are aware of few contested cases lost by Appellant. Given its experience and sizable legal and paralegal staff together with the investigative resources of the F.B.I., there is rarely an opportunity for discriminatory conduct to go undetected. Once a trial is had and an injunctive order entered, there are few litigants foolish enough to risk a contempt order.

Another forceful indication that damages are not the cornerstone to effective Section 813 actions is the reality that the Appellant never sought damages in the five years of litigation prior to this case; and, if Appellant really felt

[7] *See, e.g.*, two recent cases, Harper v. Reap Realty, No. C-75-70, (N.D. Ohio, decided Feb. 6, 1976), $10,000. verdict and $5,000. attorney fees for racial refusal to negotiate home rental; Clemons v. Runck, P-H E.O.H. REP., §13,734 (S.D. Ohio, No. C-1-74-166, decided Nov. 3, 1976), $4,500. actual and punitive damages, $5,500. attorney fees for racial refusal to sell lot; *see also*, the examples of types of recoveries cited by the court of appeals, App. A, Appellant's petition, page 8a, n. 8.

damages to be essential and recoverable, one wonders why it never prayed for damages in this or prior Section 813 actions.[8]

Appellant closes point one with reference to what is an illusory "conflict among the district courts".[9] Of the four cases cited by Appellant for the proposition that damages are available in Section 813 actions, two (*West Suburban* and *Hilton-Sykes*) were decided before the fourth circuit court of appeals' decision, and relied exclusively for Title VIII precedent on the district court decision herein. The other two cases (*Berg* and *Chatham*) contributing to this "conflict" were pre-trial motion rulings wherein the courts were seemingly unaware of the court of appeals' decision herein.[10] Thus Appellant's suggested analogy to the legitimate district

[8] Appellant cites (page 9, n.3, Appellant's petition) United States v. Fogelman Management Corp., P-H E.O.H. REP., §18,008 (W.D. Tenn., No. C-76-45, filed Feb. 5, 1976), where the defendants agreed to offer a large cash or rent settlement as an example of what would be "impermissible under the court of appeals' decision in this case." However, the *Fogelman* order was not entered on Feb. 5, 1975, as Appellant's brief indicates, but rather, on Feb. 5, 1976 - two months *after* the court of appeals' decision herein. Without speculating on whether something "impermissible" has occurred, Appellant seemingly did not consider U. S. v. Long to be controlling when it agreed to entry of the order. *See*, P-H E.O.H. REP., Report Bulletin 17 (Feb. 23, 1976).

[9] Four cases are cited for the proposition that money damages are available in Section 813 actions: United States v. Berg Enterprises, Inc., No. WPB-75-139-Civ-CF (S.D. Fla., decided Dec. 10, 1975); United States v. Chatham, No. 75-1222A (N.D. Ga., decided Dec. 24, 1975); United States v. Hilton-Sykes Rental Agency, Inc., P-H E.O.H. REP., § 13,727 (M.D. Fla., No. 74-322-Civ-T-H, decided Sept. 18, 1975); United States v. West Suburban Board of Realtors, P-H E.O.H. REP., §113,641 (N.D. Ill., No. 69-C-1460, decided Feb. 6, 1974).

[10] Although the court of appeals' decision herein remains inexplicably unreported in the official reporter system, the slip opinion was available to the government two months before *Chatham* and two and a half months before *Berg*. Why the respective district judges did not mention the only court of appeals decision on point is left to speculation; note also that the latest district court decisions from the 5th circuit, and the only decisions taking cognizance of the court of appeals' decision in U.S. v. Long, followed the latter's lead in denying monetary damages. United States v. Northside Realty Associates, Inc., No. 13,932 (N.D. Ga., decided Feb. 11, 1976); United States v. Mitchell, No. CA3-7887-G (N.D. Tex., decided June 16, 1976).

court conflict noted in *Curtis v. Loether*, 415 U.S. 189, 191 n.2 (1974), appears to be specious.

The second ground of Appellant's petition is:

> 2. The Attorney General "deems it necessary" to obtain an "other order" for money damages in Section 813 actions. Since Section 813 is silent regarding damage recoveries, an "ambiguity" exists the resolution of which is best had by interpreting Section 813 to implicitly authorize what is expressly provided for by Section 812. Additionally, this construction would square with conciliation agreements "regularly approved" by HUD under Section 810.

Appellant seems to invite an unintended legislative result by venturing into what we believe to be strained construction of an uncommonly clear statutory provision. Silence by Congress regarding money damages when enumerating the remedies available to the Attorney General becomes, according to Appellant, the origin of "ambiguity" which requires "construction"[11] of the Act. We disagree.

As the court of appeals held, a "fair reading" of Section 813 in its statutory context results in the conclusion that the words "or other order" contemplate "an order extending or implementing the equitable relief to be granted." This may include, as it did here[12], the implementation of a

[11] Appellant ignores in its construction efforts a "[v]aluable precept of statutory construction, the doctrine of *ejusdem generis*, [which] warns against expansively interpreting broad language which immediately follows narrow and specific terms." United States v. Insco, 496 F. 2d 204 (5th Cir. 1974); *see also*, United States v. Baranski, 484 F. 2d 556, 566 (7th Cir. 1973); this maxim, along with *noscitur a sociis*, is often wisely applied where words (*e.g.*, "other order") are capable of different meanings in order to avoid giving unintended breadth to the Acts of Congress. Jarecki v. G. D. Searle & Co., 367 U.S. 303 (1961); Equal Employment Op. Comm'n v. Detroit Edison Co., 515 F. 2d 301 (6th Cir. 1975).

[12] Following the precedent of United States v. West Peachtree Tenth Corp., 437 F.2d 221 (5th Cir. 1971).

comprehensive, affirmative action program. Furthermore, under the court of appeals' decision, the district judge may order refunded with interest all items of monetary relief which are appropriate to the subject of equitable restitution.[13]

Thus, the court of appeals has provided an important precedent whereby the government may not only secure swift declaratory and/or injunctive relief (including affirmative action programs, reporting requirements, etc.) without jury trials, but also *non-parties* to a Section 813 action may recover all discriminatory overcharges without ever having filed suit. Rather than impinge on judicial resources, as Appellant suggests, the common-sense approach of the court of appeals is likely to be a basis for substantial savings in judicial time and resources.[14]

We believe the Appellant to be on even more slippery legal footing when it argues that the Attorney General may seek and recover whatever he "deems necessary". As held by the court of appeals, what Congress meant was that, *among the range of declaratory or preventive orders available under Section 813*, the Attorney General might choose the appropriate relief. The words "preventive" and "order" have always had equitable relief connotations in our jurisprudential system. Reading in traditional tort relief in the

[13] *E.g.*, "ill-gotten gains" such as higher rents charged on account of race or discriminatory security deposits.

[14] Although the court of appeals did not reach the issue, Respondent would most respectfully suggest that if Section 813 were construed to permit money damage recoveries, then the Seventh Amendment would command that a jury trial be preserved as to all legal issues. Curtis v. Loether, 415 U.S. 189, 195-6 (1974); Ross v. Bernhard, 396 U.S. 531, 538 (1970); Dairy Queen, Inc. v. Wood, 369 U.S. 469 (1962); Beacon Theatres, Inc. v. Westover, 359 U.S. 500 (1959); U.S. CONST. AMEND. VII; F.R.Civ.P. 38(a), 42(b); Comment, The Seventh Amendment and Civil Rights Statutes, 68 Nw.U.L.REV. 503 (1973); Right to a Jury Trial in Civil Actions, 72 YALE L.J. 655, 692-93 (1962-63). Thus, liability to, and any damages due, each individual would have to be separately passed on by a jury if a defendant so requests.

form of money damages clearly strains the plain meaning of the words. It does not follow that (a) because Section 813 does not expressly provide for money damages, and (b) Section 812 does, then (c) Section 813 must implicitly provide for money damages.

Appellant concludes point two by stressing that its construction is supported by the "structure and spirit" of the Act; we most respectfully contend that the *wording* and *intent* of Congress are otherwise.[15]

Appellant concludes its petition with the following point:

> 3. "Preventive relief", in the context of Section 813, should be read expansively so as to include money damages. In this way public litigation can serve a private function, for "only" if damages are recoverable in Section 813 actions may "full enjoyment" of individual rights be secured.

Conceding that only a very "generous" and "expansive" reading of Section 813 could possibly result in its contended-for construction, Appellant sidesteps the basic issue of congressional intent. We submit that it is of no legal significance to this controversy that occasionally equitable

[15] Appellant also notes that the secretary of HUD "regularly" includes monetary relief in Section 810 conciliation agreements. These voluntary agreements are not made public [Section 810 (a)] and we have no way of knowing whether "regular" means "often" or "lately" or a "few times". What is clear is that the secretary has *only* the authority to use "[I]nformal methods of conference, conciliation, and persuasion". While parties to a contract may agree on almost anything, and the secretary may approve same, he has no authority, or even the slightest discretion, to impose money damages. Thus, Appellant's argument reduced to its core says no more than if the secretary is doing something not expressly provided for, it would be "anomolous"if the Attorney General could not seek something not expressly provided for.

jurisdiction may provide legal relief or that damages may deter some racial discrimination in housing.[16] The only issue is whether the language in Section 813 can be "fairly read" to find a congressional intent to provide the Attorney General with the right to obtain money damages. The court of appeals said not.

The petition concludes with an emotional plea that only if the Attorney General may secure money damages in Section 813 actions may the victims obtain full enjoyment of their rights. Aside from ignoring the obvious fact that damages are available under Section 812 and in actions under 42 U.S.C. § 1982 in unlimited amounts along with free legal services, individuals have no rights under Section 813. The Attorney General, and only the Attorney General, may in his discretion bring Section 813 actions. If he is successful, and if the district court finds it appropriate, then non-litigants may benefit by not only opened housing, but also, restitutionary money relief.

The "enjoyment" that Congress desired to be made available to all is swift, sure opening of this nation's housing on a non-discriminatory basis. While we can envision ways Congress might have written more potent legislation,[17] it apparently felt it best to provide for actual and punitive damage recoveries to be had only by individuals in Section

[16] By arguing that the court of appeals erred because it supposedly did not feel damages would "prevent" racial discrimination, Appellant poses a most transparent false premise. Of course this policy issue was never argued before, or addressed by, the court. What it decided was only that it was not sensible or fair to read money damages into "preventive relief orders" available to the Attorney General in Section 813 actions.

[17] *Eg.*, making racial discrimination in housing a criminal offense; enjoining offenders from renting or selling housing for a period of time.

812 actions.[18] Thus, while the Attorney General's task is not easy, no one ever thought it would be.[19] Nevertheless, he has been far from unsuccessful. The present action is especially dramatic evidence on that point.

II.

SECTION 813 DOES NOT PROVIDE FOR RECOVERY OF COMPENSATORY MONEY DAMAGES

Arguing that the statutory power granted it under Title VII is the virtual analogue of its power under Section 813 of Title VIII, the government offers *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975) as support for its assertion of authority.[20]

[18] There have been numerous class actions for damages, the most spectacularly ambitious being a recnt case brought by the Fair Housing Council of Bergen County against all the real estate brokerage agencies in the fifty communities serving Bergen County, N.J. (P-H E.O.H. REP., Report Bulletin 19, March 22, 1976).

[19] It is important to consider that in the government's scheme of things, as opposed to what Congress appears to have provided, that the Attorney General, *not* individuals, has the sole discretion in making the important decision as to whether to seek an 810 conciliation or institute a lawsuit for substantial money damages. This choice, which is a valuable one, is taken by the Attorney General from the citizen. Furthermore, to the extent damages are sought under Section 813, the individuals' rights to same under 42 U.S.C. §1982 or Section 812 would no doubt be proscribed

[20] Judge Higginbotham disposed of this same contention in a Section 813 action last month by noting that with Title VII "[T]he Congressional history made clear that Congress intended to grant to the Equal Employment Opportunity Commission the powers then granted to the Department of Justice under the bill, before amendment. Before amendment, the bill had directly granted to the Department of Justice the power to recover back pay." United States v. Mitchell, *supra*.

Reduced, this equates back-pay recoveries with compensatory damage recoveries. We see no basis for comparison.[21]

However, under the court of appeals' decision, equitable monetary relief is available to the government in Title VIII actions just as equitable monetary relief has been made available by at least one court in a Title VII action in which the government was a party. *United States v. Georgia Power*, 474 F.2d 906 (5th Cir. 1973). The question here is not what Congress should or could have done, but what it did. Borrowing from Mr. Justice Marshall's holding for an undivided court in *Curtis, supra* "[T]here is surely no basis for characterizing . . . compensatory . . . damages . . . as equitable relief." 415 U.S. at 197. Nor does Section 813 include a "[s]imple authorization of an action for . . . damages" *id.*, such as found in Section 812. This "[c]onspicuous silence [in Section 813] as to the right of the government to recover money damages . . . ." *Mitchell, supra*, is the best indication of congressional intent.

Therefore, we believe the fourth circuit court of appeals was right for the right reasons. As was forcefully said in the latest opinion on point, "[T]o read here this power [to award damages] into [Section 813] in the guise of statutory construction is simply substituting the judgment of the court for that of Congress . . . . [L]iberal construction, coupled with a judgment as to what ought to have been provided by Congress (in the judgment of the court) cannot either supply missing language or create ambiguity." *Mitchell, supra.*

[21] Also, most district courts are in general agreement that damages are not recoverable in Title VII actions. Van Hoomissen v. Xerox Corp., 368 F.Supp. 829, 835-38 (N.D. Cal. 1973); Howard v. Lockheed-Georgia Co., 372 F.Supp. 854, 855-56 (N.D. Ga. 1974) ("If Congress had intended Title VII to authorize actions for compensatory damages, it would have made clear that desire.") Loo v. Gerarge, 374 F.Supp. 1338, 1341-42 (Hawaii 1974).

CONCLUSION

For the foregoing reasons, Respondents respectfully submit that the petition should be denied.

Respectfully submitted,

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July, 1976